A

MOHD JOHARI AWANG

v.

ANEKA PRESTIJ SDN BHD & ANOTHER APPEAL

B

COURT OF APPEAL, PUTRAJAYA
MOHAMAD ARIFF YUSOF JCA
MAH WENG KWAI JCA
DAVID WONG DAK WAH JCA
[CIVIL APPEALS NO: T-02(NCVC)(W)-1076-05-2013 &
C T-02(NCVC)(W)-1085-05-2013]
18 APRIL 2014

CONTRACT: *Agency - Claim for commission payable - Whether agreement for 'consultancy fee' contravened s. 24 of Contracts Act 1950 -*
D *Whether contract by private companies merely business agreement - Whether there was 'public' element - Whether contract legal*

CONTRACT: *Agency agreement - Construction of - Allegation of fraud in amount of commission payable - Whether allegation proven - Whether*
E *conduct and documentary evidence negated allegation*

The appellant, upon request by RME Sdn Bhd ('RME') to source for a contractor to perform works in respect of a project, approached the respondent. The appellant informed the respondent that in the event that RME appointed them as the
F contractor of the project, they were required to pay a consultancy fee of RM6.3 million, with RM3.3 million to be paid as initial payment to the appellant and RM3 million to be paid to RME. Consequently, the respondent gave five post dated cheques to the appellant out of which four cheques amounting to RM2.7 million
G were deposited by the appellant and were cleared. However, the remaining cheque for RM600,000 was not deposited on the respondent's instruction and had since lapsed and became invalid. The appellant therefore demanded the said sum from the respondent. On the other hand, the respondent alleged that the
H appellant had fraudulently represented that RM6.3 million was to be paid to RME when RME had only requested for the sum of RM5 million. Hence, the respondent counterclaimed for the overpayment of RM700,000 to the appellant. The learned judge held that the arrangement in which the appellant, respondent and
I RME entered into in respect of the so-called 'consultancy fee' contravened s. 24 of the Contracts Act 1950 ('the Act') and therefore dismissed both the appellant's claim for the consultancy

fee of RM600,000 and the respondent's counterclaim for the amount of RM700,000. Hence, the appeal by the appellant and cross-appeal by the respondent. The issues for the court's determination were whether s. 24 of the Act is applicable to the arrangement made between the parties and which version of the events was more credible.

Held (allowing appellant's appeal; dismissing respondent's cross-appeal)
Per David Wong Dak Wah JCA delivering the judgment of the court:

(1) The dispute concerned a claim for consultancy fees agreed to by the respective parties and RME, a private company, which had obtained a government project and had sought help from the appellant to look for someone to execute the works and manage the construction of the project. Once the project was awarded to a private enterprise, whatever agreement reached by parties in the private sector was, pure and simple, a business agreement. The project may be a government project but once RME was the owner of the project, any so called 'public' element disappeared. Hence, the learned judge had misapplied the principles embodied in s. 24 of the Act. (para 17)

(2) A contract to earn commission is perfectly legal unless it is tainted by some form of illegality such as corruption. In this case, there was no such illegality (*David Wong Hon Leng v. Noorazman Adnan*; refd). (para 18)

(3) The respondent alleged that it was informed by two persons that RME only requested the sum of RM5 million and not RM6.3 million as requested by the appellant, which led to the allegation of fraud. However, the persons were never called as witnesses to testify on the allegation and thus, the allegation suffered fatal flaws. Further, the respondent's own witness from RME never confirmed the allegation except to confirm that the appellant was entitled to commission although the amount was not mentioned. (para 19)

(4) The respondent, although not disputing that it was required to pay the commission for getting the contract works for the project, disputed the amount payable. However, prior to the suit, at no time did the respondent demand for the so called overpayment of RM700,000 from the appellant. The

A respondent also did not stop the last cheque before its expiry even after they were informed that the actual amount was only RM5 million to RME. Based on the conduct of the respondent and the existence of the cheques, the reasonable inference was that the appellant's version of events was more B probable. (paras 20 & 21)

Bahasa Malaysia *Translation Of Bahasa Malaysia*

Perayu, atas permintaan oleh RME Sdn Bhd ('RME') untuk mendapatkan kontraktor bagi melaksanakan kerja-kerja berkaitan C dengan suatu projek, berjumpa dengan responden. Perayu memberitahu responden bahawa jika RME melantik mereka sebagai kontraktor projek tersebut, mereka perlu membayar fi perunding sebanyak RM6.3 juta, dengan RM3.3 juta dibayar sebagai bayaran permulaan kepada perayu dan RM3 juta dibayar kepada RME. D Berikutan itu, responden memberikan lima keping cek tarikh tertunda kepada perayu yang mana empat daripada cek tersebut berjumlah RM2.7 juta telah didepositkan oleh perayu dan bayarannya telah dilepaskan. Walau bagaimanapun, baki cek untuk bayaran sebanyak RM600,000 tidak didepositkan atas arahan E responden dan oleh itu telah luput dan menjadi tidak sah. Perayu oleh itu menuntut jumlah tersebut daripada responden. Sebaliknya, responden mendakwa bahawa perayu telah, secara fraud, membuat representasi bahawa sejumlah RM6.3 juta perlu dibayar kepada RME apabila RME hanya meminta jumlah RM5 juta. Dengan itu, F responden menuntut balas bagi jumlah terlebih bayar sebanyak RM700,000 kepada perayu. Yang arif hakim memutuskan bahawa pengaturan di mana perayu, responden dan RME memasuki apa yang dikatakan 'fi perunding' bercanggah dengan s. 24 Akta Kontrak 1950 ('Akta') dan dengan itu, menolak kedua-dua G tuntutan perayu bagi fi perunding sebanyak RM600,000 dan tuntutan balas responden bagi jumlah RM700,000. Maka, rayuan oleh perayu dan rayuan balas oleh responden. Isu-isu bagi pertimbangan mahkamah adalah sama ada s. 24 Akta adalah digunapakai kepada pengaturan yang dibuat antara pihak-pihak, H dan versi kejadian mana yang terpakai kepada pengaturan yang dibuat antara pihak-pihak dan versi kejadian mana yang lebih boleh dipercayai.

I

Diputuskan (membenarkan rayuan perayu; menolak rayuan balas responden)
Oleh David Wong Dak Wah HMR menyampaikan penghakiman mahkamah:

(1) Pertikaian adalah berkaitan dengan tuntutan bagi fi perunding yang dipersetujui oleh pihak masing-masing dan RME, sebuah syarikat swasta, yang telah memperolehi projek kerajaan dan telah meminta bantuan perayu untuk mendapatkan seseorang untuk melaksanakan kerja-kerja dan menguruskan pembinaan projek tersebut. Sebaik sahaja projek tersebut diawardkan kepada syarikat swasta, apa-apa perjanjian yang dimasuki oleh pihak-pihak dalam sektor swasta adalah jelas dan semata-mata, perjanjian perniagaan. Mahkamah tidak boleh mempertimbangkan bagaimana perjanjian tersebut boleh mempunyai apa-apa unsur 'umum'. Projek tersebut mungkin projek kerajaan tetapi sebaik sahaja RME adalah pemilik projek tersebut, apa-apa unsur 'umum' telah hilang. Dengan itu, yang arif hakim telah tersalah guna prinsip yang terkandung dalam s. 24 Akta.

(2) Sesuatu kontrak untuk memperoleh komisyen adalah sah kecuali ia dicemari oleh suatu bentuk ketaksahan seperti rasuah. Dalam kes ini, tidak ada ketaksahan sedemikian (*David Wong Hon Leng v. Noorazman Adnan*; dirujuk)

(3) Responden mendakwa bahawa ia telah diberitahu oleh dua orang bahawa RME hanya meminta jumlah RM5 juta dan bukan RM6.3 juta seperti yang diminta oleh perayu, yang menjurus kepada dakwaan fraud. Walau bagaimanapun, dua orang tersebut tidak dipanggil sebagai saksi untuk memberikan keterangan mengenai dakwaan tersebut dan dengan itu, dakwaan tersebut mengalami kecacatan yang menjejaskan. Selanjutnya, saksi responden sendiri daripada RME tidak pernah mengesahkan dakwaan tersebut kecuali mengesahkan bahawa perayu berhak kepada komisyen walaupun jumlahnya tidak dinyatakan.

(4) Responden, walaupun tidak mempertikaikan bahawa ia diperlukan untuk membayar komisyen untuk mendapatkan kerja-kerja kontrak bagi projek tersebut, mempertikaikan jumlah yang perlu dibayar. Walau bagaimanapun, sebelum guaman ini, responden tidak pernah menuntut pada bila-bila masa, bagi bayaran terlebih bayar sejumlah RM700,000 yang didakwa.

A Responden juga tidak menghentikan cek terakhir sebelum ia luput walaupun mereka diberitahu bahawa jumlah sebenar adalah hanya RM5 juta sahaja kepada RME. Berdasarkan tindakan responden dan kewujudan cek-cek tersebut, inferens munasabah adalah bahawa versi kejadian oleh perayu adalah
B lebih berkemungkinan.

Case(s) referred to:
Armagas Ltd v. Mundogas SA; The 'Ocean Frost' [1985] 1 Lloyd's Rep 1 ***(foll)***
David Wong Hon Leong v. Noorazman Adnan [1995] 4 CLJ 155 CA ***(refd)***
C *PP v. Dato Saidin Thamby [2012] 4 CLJ 15 CA* ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24

D *For the appellant - Karamjit Singh Harbhajan Singh; M/s Bhadarul Baharain & Partners*
For the respondent - Ahmad Musthafi Mohamad; M/s Ahmad Musthafi & Co

[Appeal from High Court, Kuala Terengganu; Suit No: 22NCVC-18-12-2011]
E

Reported by S Barathi

F **JUDGMENT**

David Wong Dak Wah JCA:

Introduction

G **[1]** There are two appeals before us. One appeal relates to the decision of the High Court in which learned judge dismissed the appellant/plaintiff's claim against the respondent/defendant for consultancy fees of RM600,000. The other appeal relates to the dismissal of the respondent/defendant's counterclaim for a payment
H of RM700,000 made pursuant to an alleged fraudulent misrepresentation by the appellant/plaintiff.

[2] We heard the appeals and after due consideration to the respective submissions of counsel, we allowed the appellant's appeal relating the claim of RM600,000 but dismissed the
I respondent's appeal relating to the counterclaim of RM700,000.

[3] The respondent has recently applied for leave to appeal to the Federal Court. We now give our reasons for our decision.

The Dispute

Appellant's Version

[4] The appellant was approached by RME Sdn Bhd ("RME") to help them to source for a contractor willing to perform works in respect of a project in the State of Terengganu. The worth of the project is in the sum of RM45,952,264.40.

[5] The appellant pursuant to that request from RME approached the respondent concerning the project and had informed the respondent that in the event that RME appoints them as the contractor of the Terengganu project, they are required to pay a consultancy fee of RM6,300,000.

[6] The payment of the RM6.3 million is to be in following manner:

(i) RM3.3 million to be paid as an initial payment to the appellant;

(ii) The balance of RM3 million to be paid to RME by way of instalments during the construction of the project.

[7] In respect of the RM3.3 million, the respondent had given five post-dated cheques to the appellant, particulars as follows:

No	Payment Voucher	Dated	Cheque Number	Amount
1	AP 10169	12-10-2010	MBB 647248	RM 1,000,000.00
2	AP 10169	12-10-2010	MBB 647249	RM 500,000.00
3	AP 10169	12-10-2010	MBB 647250	RM 500,000.00
4	AP 10190	26-10-2010	MBB 653863	RM 600,000.00
5	AP 10190	26-10-2010	MBB 653864	RM 700,000.00
				RM 3,300,000.00

[8] Four cheques amounting to RM2.7 million were deposited by the appellant and were cleared. The remaining cheque of RM600,000 was not deposited on the instruction of the respondent. That cheque had since lapsed and become invalid.

[9] The appellant demanded from the respondent to pay the sum of RM600,000 which the respondent refused to do, resulting in this claim by the appellant.

Respondent's Version

[10] As mentioned earlier, the respondent had filed a counterclaim against the appellant for the sum of RM700,000. The circumstance giving rise to this counterclaim is this.

[11] According to the respondent, the appellant had represented to the respondent that the sum of RM6.3 million is to be paid to RME when in fact RME had only requested for the sum of RM5 million. This representation according to the respondent is fraudulent and it is upon this premise that the counterclaim is made.

[12] It is undisputed that the respondent had made payment amounting to RM5.7 million which is made up of the RM3 million paid direct to RME plus the sum RM2.7 million paid to the appellant *via* the above mentioned four cheques. Bearing in mind that the respondent's contention that RME had only requested an amount of RM5 million, there is thus an overpayment of RM700,000 which forms the respondent's counterclaim.

High Court Decision

[13] The learned judge after reviewing the totality of the evidence came to the conclusion that the arrangement in which the appellant, respondent and RME entered into in respect of the payment of the so called 'consultancy fee' contravenes s. 24 of the Contracts Act 1950 which reads as follows:

> The consideration or object of an agreement is lawful, unless:
>
> (a) it is forbidden by a law;
>
> (b) it is of such a nature that, if permitted, it would defeat any law;
>
> (c) it is fraudulent;

(d) it involves or implies injury to the person or property of another; or

(e) the court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

14. ILLUSTRATIONS

(f) A promises to obtain for B an employment in the public service, and B promises to pay RM1,000 to A. The agreement is void, as the consideration for it is unlawful.

[14] The learned judge also found that the appellant acted in bad faith. Premised on a breach of s. 24 of the Contracts Act 1950 and bad faith of the appellant, the learned judge dismissed the appellant's claim and also dismissed the respondent's counterclaim. The learned judge's reasonings in his words are these:

Dalam keadaan ini saya mendapati bahawa wujud unsur *mala fide* di pihak Plaintif dan transaksi yang dijalankan dengan Defendan telah dibuat dengan niat tidak baik (not in good faith). Makanya, jawapan saya terhadap tuntutan Plaintif adalah negatif bergantung kepada peruntukan Seksyen 24 Akta Kontrak 1950, misalan (f).

Saya juga mendapati keputusan kes yang dirujuk oleh peguam Plaintif dalam kes *David Wong Hon Leong v. Noorazman bin Adnan* [1995] 4 CLJ 155 tidak terpakai dalam konteks kes dihadapan saya. Dalam kes ini Hakim Gopal Sri Ram yang bersidang sebagai Mahkamah Rayuan telah menyatakan:

[1] Ianya bukan dan tidak pernah menjadi undang-undang dalam negara ini bahawa untuk menyokong suatu perjanjian, balasan mesti disempurnakan. Balasan dalam bentuk perlaksanaan juga memadai.

[2] Di sini terdapat janji yang dibuat oleh responden bahawa beliau akan membantu mendapatkan kelulusan yang diperlukan untuk penukaran dan pecahbahagian tanah. Perayu telah berjanji akan membayar responden sebanyak RM268,888.00 untuk perkhidmatan itu. Secara *ab initio*, terdapat janji untuk suatu janji dan ini adalah balasan yang baik di sisi undang-undang.

A [3] Responden telah membuat suatu untuk mendapatkan sokongan Menteri Besar terhadap permohonan syarikat tersebut dan kelulusan telah diperolehi. Jadinya, responden telah 'delivered the goods'.

Walau bagaimanapun, fakta kes dihadapan saya adalah berbeza di
B mana perjanjian untuk bayar perkhidmatan bagi mendapatkan balasan yang lain tidak dimulakan oleh Defendan. Pihak RME Sdn Bhd yang terlebih dahulu meminta Plaintif mendapatkan subkontraktor bagi menjalankan projeknya yang mana telah ditawarkan kepada Defendan dengan harga yang melebihi nilai
C kontrak yang sebenar oleh Plaintif.

Kedua, walaupun Perjanjian Subkontrak tersebut bernilai RM5 juta sahaja, Defendan perlu membuktikan kepada mahkamah di tahap *prima facie* bahawa Plaintif telah melakukan representasi palsu/frod dan memperdaya beliau untuk membuat bayaran sebanyak RM3.3
D juta, yang mana telah tidak dibuktikan oleh Defendan. Pengakuan SD1 bahawa RME telah menerima RM2 juta untuk bayaran kontrak tersebut tidak secara nyata membolehkan Defendan mendapatkan semula lebihan wang yang dibayar kepada Plaintif berjumlah RM700,000 memandangkan bayaran tersebut telah
E dibuat secara sukarela oleh Defendan.

Selain itu, saya mendapati bahawa keadaan ini berlaku berpunca dari kecuaian/kelalaian atau tinggalan Defendan sendiri yang telah memajukan bayaran kontrak tersebut kepada Plaintif sebelum perjanjian subkontrak dimasuki dengan pihak yang relevan, iaitu
F RME Sdn Bhd.

Saya merujuk kepada keputusan Mahkamah Rayuan dalam kes *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2013] 1 MLJ 597 yang menegaskan:

G > keseluruhan perjanjian menjadi perjanjian tidak sah dalam ertikata Seksyen 24 Akta Kontrak. Memandangkan keseluruhan transaksi dicemari dengan ketaksahan, instrument lain yang berkaitan juga turut dicemari dengan ketaksahan.

H Dalam kes di atas, Defendan telah menggunakan Chin bagi mendapatkan tanah anak watan Sabah bagi pihaknya dan urusan pembelian tanah tersebut telah diluluskan oleh pihak Plaintif. Setelah mengetahui transaksi adalah bersalahan dengan Ordinan Tanah Sabah, Plaintif menfailkan tuntutan bagi mendapatkan
I semula wang yang telah dipinjamkan kepada Defendan di bawah Seksyen 66 Akta Kontrak 1950 tetapi telah ditolak oleh Mahkamah atas sebab 'ketaksahan'.

Our Grounds Of Decision

[15] In our view there are two determinative issues which are these:

(a) Whether s. 24 of the Contracts Act 1950 is applicable to the arrangement made between the parties?

(b) Which version of the events is more credible?

Section 24 Of The Contracts Act 1950

[16] From the pleadings and the manner in which the evidence was tendered in court, the applicability of s. 24 was not an issue argued by the respective parties. In fact it was the learned judge on his own volition who had applied s. 24 of the Contracts Act 1950 presumably on the ground of the so called consultancy agreement being tainted with illegality and as such learned judge felt that he was entitled to take cognisance of it irrespective whether or not it was pleaded or argued. We have no issue with the approach taken by learned judge.

[17] However and with respect, we are unable to see how s. 24 is applicable to the factual matrix of this appeal. This dispute concerns a claim for consultancy fees agreed to by the respective parties and RME which is a private company which had obtained a government project and had sought the help from the appellant to look for someone to execute the works and manage the construction of the project. Once the project is awarded to a private enterprise, whatever agreement reached by parties in the private sector is pure and simple a business agreement. How that agreement can have any 'public' element, we are unable to see. The project may be a government project but like we said once RME is the owner of that project, any so called 'public' element disappears. Hence we find that the learned judge misapplied the principles embodied in s. 24 of the Contracts Act 1950.

[18] Before we leave this issue, this court has held that earning a commission *per se* is not forbidden by law unless it is earned in a form of a bribe. In *PP v. Dato Saidin Thamby* [2012] 4 CLJ 15 this court states as follows:

> There is nothing wrong in making a commission. It has been sanctioned by this court in *David Wong Hon Leong v. Noorazman Adnan* [1995] 4 CLJ 155, CA. In that case, there was an application by the appellant to convert and subdivide the land.

A The respondent promised to assist in obtaining approval of the application. In return, the appellant promised to pay the respondent RM268,888 for that service. That consideration, namely the exchange of mutual promises, although executory, was held to be a good consideration. It was also held that there was a binding agreement between the parties. It was further held that the submission that the respondent did nothing to earn his fee was unmeritorious. The respondent had expended his exertions in securing the Menteri Besar's support for the appellant company's application, and the application had in fact been approved. It was held that the respondent's actions came within the terms of s. 2(d) of the Contracts Act 1950 which provides that when the promisee has done something at the desire of the promisor, such act is a consideration for the promise.

Hence, we disagree with the learned judge that the case of *David Wong Hon Leong (supra)* was not relevant to the case before us. The principle there is simple and it is this. A contract to earn commission is perfectly legal unless it is tainted by some form of illegality such as corruption. In this case as we said earlier, there is no such illegality.

Which version is more credible?

[19] The main complaint of the respondent is that it was informed by Amirnordin bin Samsudin and Hanif in March 2011 that RME in fact only requested a sum of RM5 million and not RM6.3 million as requested by the appellant. Hence the allegation of fraud by the appellant. That allegation suffers the fatal flaw that these two persons were never called as witnesses to testify on that allegation. Further the respondent's own witness from RME never confirmed that allegation except to confirm that the appellant is entitled to commission though how much was not mentioned.

[20] Further there is no dispute by the respondent that it was required to pay some commission for getting the contract works for the project. The only dispute is simply the amount payable. In resolving this dispute we apply the approach set out in the case of *Armagas Ltd v. Mundogas SA; The 'Ocean Frost'* [1985] 1 Lloyd's Rep 1 at p. 37:

> It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents to the witnesses' motives, and to the overall probabilities can be of very great assistance to a judge in ascertaining the truth.

[21] Applying the above approach, the documentary evidence is simply in the form of the cheques given to the appellant. Prior to this suit at no time did the respondent demand for the so-called overpayment of RM700,000 from the appellant. Further as pointed out by learned counsel for the appellant, the respondent did not stop the last cheque prior to its expiry in April 2011 even after they were allegedly told in March 2011 that the actual amount payable is only RM5 million to RME. The reasonable inference from the conduct of the respondent and the existence of the cheques is simply that the appellant's version of events is the more probable one.

[22] The allegation of bad faith even if proved does not with respect advance the respondent's contention. It is neither here nor there. A promise to secure a contractor like stated earlier is nothing but the manner in which business is conducted in the private sector and it is not the court's duty to regulate their behaviour except when it is forbidden by law. Here we see no such prohibition.

Conclusion

[23] Accordingly we allow the appeal of the appellant and allow paras. 13(a) and (b) of the statement of claim. As for the cross-appeal of the respondent, it is dismissed. We award costs in the sum of RM40,000 for both the appeal and cross-appeal. We also order that the deposits to be refunded.